Supreme Court of the United States.

No. 238.—October Term, 1904.

The Savannah, Thunderbolt and Isle of Hope Railway of Savannah, Georgia, Plaintiff in Error, vs. The Mayor and Aldermen of the City of Savannah.	In Error to the Supreme Court of the State of Georgia.

[May 15, 1905.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill in equity brought by the plaintiff in error to restrain the collection of a municipal tax by the defendants. The bill sets forth, among other grounds, that the tax impairs the obligation of a contract, and also is an attempt to take the plaintiff's property without due process of law, contrary to the Constitution of the United States. According to the bill and the fifth assignment of error there is no law of the State of Georgia which authorizes the imposition of the tax. Were this true the foundation of our jurisdiction would be gone and this writ of error should be dismissed. See *Barney* v. *City of New York*, 193 U. S. 430. But although the plaintiff has taken inconsistent positions and has confused questions for the State Court alone with those which may be brought here, still, since it has shown a clear intent to raise the Federal question from the beginning, since the bill in another place alleges that the tax is an authority exercised under the State of Georgia and other assignments of error present the points, and since the State Court has decided that the tax was authorized, we shall not stop the case at the outset. See *Hamilton Gas Light & Coke Co.* v. *Hamilton*, 146 U. S. 258.

The tax is imposed under an ordinance of March 22, 1899, providing by way of amendment to one of the year before, that "street railway companies, whether under the control of another company or not, in lieu of the specific tax heretofore required, shall pay to the city of Savannah for the privilege of doing business in the city and for the use of the streets of the city, at the rate of $100 per mile or fraction of a mile of track used in the city of Savannah by said railroad company." The plaintiff is a street railroad company, commonly known as such, and the great part of its business and revenue is due to the use of the streets of Savannah by its electric passenger street cars. One of its grounds of attack is that the Central of Georgia Railway Company, a steam railway, is not subjected to the tax, and yet that it also does business in the streets of the city by

transporting freights from its regular station to various side tracks, and charges an additional or local price. The plaintiff contends that a classification which distinguishes between an ordinary street railway and a steam railroad making an extra charge for local deliveries of freight brought over its road from outside the city, is contrary to the Fourteenth Amendment and void.

The other ground on which the validity of the tax is denied is a contract made between the plaintiff and respondent on November 4, 1897, amended in April, 1898, and on July 27, 1898. It is contended that this contract implies that the plaintiff is to have the use of the streets without further charges than those which it imposes.

The trial Court refused a preliminary injunction, and its decree was affirmed by the Supreme Court, 112 Ga. 164, which decided that this was a business tax, lawfully imposed, and that the plaintiff did not stand like the Central of Georgia Railway, which, as was held in *City Council of Augusta* v. *Central Railroad*, 78 Ga. 119, is subject to taxation by the State alone. On final hearing a verdict was directed for the defendant, and a decree was entered making the same the decree of the Court. This also was affirmed by the Supreme Court. 115 Ga. 137. The case then was brought here.

The merits of the case are pretty nearly disposed of by the statement. The argument on the first point is really a somewhat disguised attempt to go behind the decision of the State Court that the tax is a tax on business, and to make out that it is a charge for the privilege of using the streets. We see no ground on which we should criticise or refuse to be bound by the local adjudication. The difference between the two railroads is obvious, and warrants the diversity in the mode of taxation. The Central of Georgia Railway may be assumed to do the great and characteristic part of its work outside the city, while the plaintiff does its work within the city. If the former escapes city taxation it does so only because its main business is not in the city and the State reserves it for itself.

As to the contract, if the city had attempted to bargain away its right to tax, probably it would have been acting beyond its power. *Augusta Factory* v. *City Council of Augusta*, 83 Ga. 734, 743. However, it made no such attempt. It is enough to say that it uses no language to that effect, or words which even indirectly imply that exemption for the future was contemplated. *Wells* v. *Savannah*, 181 U. S. 531, 539, 540. *S. C.*, 107 Ga. 1. *New Orleans City & Lake Railroad* v. *New Orleans*, 143 U. S. 192. But we will go a little more into detail.

The contract was made on a petition of the plaintiff stating its desire to make changes in its lines of track "for the purpose of operating its railroad more economically and to better advantage and at the same time affording more adequate facilities to the public." Various changes were agreed on

in the way of moving old tracks and laying down new ones. Among other particulars the railroad agreed to convey or cause to be conveyed certain lands in Bolton Street and Whitaker Street, "preserving of course the easement of the said street railway company over said land for its railway purposes." In the last amendment to the contract an extension is agreed to, "and the right to lay down, construct, maintain and operate said railway through said streets as before stated is granted subject to the control and regulation of the said mayor and aldermen, the same as other lines of railway as provided in said contract of November 4th, 1897." It is said that these phrases exempt at least so much of the road as they cover, and that therefore the tax is void as a whole, because it does not appear what proportion of it is attributable to unexempted portions.

This kind of argument seems to assume that the tax is a tax on the right to use the streets and not a tax on the business. But a sufficient answer is that none of the expressions quoted import any exemption from taxation whatever, if it was within the power of the city to grant it. See *New Orleans City & Lake Railroad* v. *New Orleans*, 143 U. S. 192. We are of opinion that the plaintiff's case fails on every ground.

Decree affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.